Court Confirms that the Privilege Can Protect Employee-to-Employee Communications

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In his November 28, 2012 “Privilege Points” release, Tom Spahn discusses the application of the attorney-client privilege between the client’s employees outside the presence of counsel.

Although the attorney-client privilege primarily protects communications between clients and their lawyers, the protection can sometimes extend to communications between corporate employees without a lawyer's participation. Because an adversary can determine by reviewing a litigant's privilege log whether a communication included a lawyer, courts frequently deal with this issue.

In *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, Misc. A. No. 09-564 (JMF), 2012 U.S. Dist. LEXIS 138854, at *24 (D.D.C. Sept. 27, 2012), the court could not have been any clearer: "[C]ommunications among employees of a client are still afforded the protection of the privilege, so long as the communications concern legal advice sought or received that was intended to be confidential."

Most courts recognize that the privilege can protect employee-to-employee communications (1) before the employees communicate with a lawyer, as they formulate a question to pose; (2) during an employee's communication with a lawyer, such as an employee's notes; or (3) after a privileged communication, when one employee relays a lawyer's advice to another employee who has a need to know it. The first category is the hardest to prove, and the last category presents the easiest argument in favor of privilege protection.